

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MEDMARC CASUALTY	:	CIVIL ACTION
INSURANCE COMPANY,	:	
Plaintiff,	:	NO. 01-2394
	:	
v.	:	
	:	
ARROW INTERNATIONAL, INC., :	:	
Defendant.	:	

**MEMORANDUM**

BUCKWALTER, J.

February 4, 2003

Presently before the Court are Plaintiff's and Defendant's Cross Motions for Summary Judgment, and the parties' responses and replies thereto. For the reasons set forth below, Defendant's Motion is **GRANTED** and Plaintiff's Motion is **DENIED**.

**I. BACKGROUND**

This is a declaratory judgment action filed by Plaintiff, Medmarc Casualty Insurance Company ("Plaintiff" or "Medmarc") against Defendant, Arrow International, Inc. ("Defendant" or "Arrow"). Arrow was found liable in a separate and unrelated action in Independence County, Arkansas ("underlying action") in the amount of \$100,000 in compensatory damages and \$4,000,000 in punitive damages.<sup>1</sup> Pl.'s Compl. at ¶¶ 9, 10.

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1. On December 16, 1999, Misty Long Sparks, as the executrix of the estate of the decedent, Robert Long, filed suit against Arrow alleging that a medical device manufactured by Arrow caused the death of Robert Long. Pl.'s Mot. Summ. J. at 3-4.

Medmarc, having insured Arrow under a policy with a \$5,000,000 limit on liability (“Policy”),<sup>2</sup> defended Arrow in the Arkansas action. Pl.’s Compl. at ¶ 12; Def.’s Mot. Summ. J., Statement of Material Facts at ¶ 52. However, Medmarc now refuses to indemnify Defendant for the award of punitive damages, because it believes Pennsylvania law governs the Policy.<sup>3</sup> Pl.’s Mot. Summ. J. at 8. On the other hand, Arrow believes that the Policy is governed by Arkansas law, because there is a choice-of-law provision in the Policy which reads, “except when prohibited by statute, coverage for punitive or exemplary damages is included.”<sup>4</sup> Def.’s Mot. Summ. J.

There are several facts lending credibility to both parties’ choice for which law should govern the Policy. Arrow is a corporation organized and existing under the laws of Pennsylvania, with its principal place of business also in Pennsylvania. Pl.’s Mot. Summ. J. at 3. Medmarc is an insurance company organized and existing under the laws of Vermont with its principal place of business in Virginia. Pl.’s Mot. Summ. J. at 3. Arrow retained the Philadelphia office of the national insurance brokerage firm Marsh USA (“Marsh”) to act as its broker in the negotiation of the Policy with Medmarc. Pl.’s Mot. Summ. J. at 4. After the Policy was negotiated, Medmarc forwarded it to Marsh in Philadelphia, who then forwarded it to Arrow in Reading, Pennsylvania. Pl.’s Mot. Summ. J. at 5. The premiums for the Policy were mailed

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2. The Policy referenced in this action was in effect from September 1, 1999 to September 1, 2000. Def.’s Mot. Summ. J., Statement of Material Facts at ¶ 26.

3. Although Pennsylvania has no statute denying coverage to insureds for punitive damages, there is a strong public policy precluding such coverage, unless the damages are rendered as a result of vicarious liability. TIG Ins. Co. v. Nobel Learning Cmty, Inc., No. 01-4708, 2002 U.S. Dist. LEXIS 10870, at \*43-44.

4. Arkansas law allows for insureds to retain coverage for punitive damages. Southern Farm Bureau Cas. Ins. Co. v. Daniel, 246 Ark. 849 (1959).

to Marsh's New Jersey lockbox, and Marsh subsequently sent these payments to Medmarc in Virginia. Def.'s Mem. in Opp. to Pl.'s Mot. Summ. J. at 7.

Arrow is registered to do business in California, Delaware and Massachusetts, and it has production facilities in Pennsylvania, Massachusetts, New Jersey, North Carolina, Mexico and the Czech Republic. Pl.'s Mot. Summ. J. at 3. The product in issue in the underlying litigation was manufactured in many places, but the specific product which caused fatal harm to the decedent was manufactured in Pennsylvania and Mexico and either North Carolina or New Jersey.<sup>5</sup> Pl.'s Mot. Summ. J. at 5. The specific product was sold to a doctor or hospital in Arkansas, and the decedent passed away in Arkansas. The executor of his estate filed suit in Arkansas, and the damages were awarded to her in that state. Def.'s Mot. Summ. J., Statement of Material Facts at ¶¶ 46, 48.

## **II. STANDARD OF REVIEW**

A motion for summary judgment will be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Since a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

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5. Given that the product was manufactured in numerous locations, it was impossible for Arrow to determine whether the particular parts of the specific product used in the decedent were manufactured in North Carolina or New Jersey. Def.'s Mot. Summ. J. at ¶ 47.

The ultimate question in determining whether a motion for summary judgment should be granted, is “whether reasonable minds may differ as to the verdict.” Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 129 (3d Cir. 1998). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson, 477 U.S. at 248.

### III. DISCUSSION

In deciding whether Arrow is entitled to coverage for the punitive damages it owes in the underlying action, it is necessary to establish whether Pennsylvania or Arkansas law governs the Policy. If Pennsylvania law were to govern, it is likely<sup>6</sup> that Plaintiffs would not have to indemnify Arrow for the punitive damages awarded against it, for two reasons. First, there is a strong public policy against allowing insurance companies to provide coverage for punitive damages in Pennsylvania. TIG Ins. Co. v. Nobel Learning Cmty., Inc., No. 01-4708, 2002 U.S. Dist. LEXIS 10870, at \*43-44 (E.D. Pa. June 19, 2002); see also Argonaut Great Cent. Ins. Co. v. Phil’s Tavern, Inc., No. 01-2191, 2001 U.S. Dist. LEXIS 17670, at \*6 (E.D. Pa. Oct. 30, 2001). Second, the Policy precludes punitive damage coverage when prohibited by statute. However, if the law of Arkansas applies, Medmarc will be required to provide coverage to Arrow, because Arkansas law allows for insurance companies to provide punitive damage coverage, and the Policy provides that coverage for punitive damages is allowed when permitted by law. Southern Farm Bureau Cas. Ins. Co. v. Daniel, 246 Ark. 849 (1969). As the outcome of

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6. It is possible that Medmarc would still be obligated to indemnify Arrow for the punitive damages awarded against it even if Pennsylvania law applied, because the Policy provides that punitive damage coverage is only included where it is not precluded by *statute*. Pennsylvania has no *statute* precluding coverage for punitive damages. It is merely against *public policy* in Pennsylvania to allow for such coverage.

this case revolves entirely around which state's law applies, this case can be disposed of on the parties' Motions for Summary Judgment.<sup>7</sup>

A district court must use the choice-of-law rules of the forum state when making a choice-of-law determination. Am. Contract Bridge League v. Nationwide Mut. Fire Ins. Co., 752 F.2d 71, 74 (3d Cir. 1985); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). As this action has been brought in the Eastern District of Pennsylvania, Pennsylvania substantive law applies to the analysis of which state's law governs the Policy.

In making a choice-of-law determination, the Pennsylvania Supreme Court has “adopted a flexible choice-of-law rule which permits an ‘analysis of the policies and interests underlying the particular issue before the court’ and a determination of which jurisdiction is most intimately concerned with the outcome of the litigation.” Am. Contract, 752 F.2d at 74. Under this test, the state with the most significant contacts and the clearest interest in the problem and outcome is the forum whose law should be applied.<sup>8</sup> In re Complaint of Banker's Trust Co., 752 F.2d 874, 882 (3d Cir. 1984). Factors for the court to consider in determining whose contacts are most significant include the place of contracting, the place of negotiation of the contract, the place of performance of the contract, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties. KNK

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7. Medmarc does not dispute the fact that, if Arkansas law applies rather than Pennsylvania law, punitive damages are covered pursuant to the Policy. Pl.'s Mot. Summ. J. at 2 n.3.

8. The preliminary question in a choice-of-law analysis is whether a false conflict exists. Kilmer v. The Connecticut Indem. Co., 189 F.Supp.2d 237, 244 (M.D. Pa. 2002). A false conflict is one where application of the laws of the two jurisdictions would produce the same result from both jurisdictions. Id. If such a conflict exists, it does not matter which law will be applied, and the court can avoid the choice-of-law question. Id. In this case, if Pennsylvania law applies, Plaintiff will not have to indemnify Defendant for the punitive damages awarded against it; but if Arkansas law applies, Plaintiff will have to indemnify Defendant. Accordingly, there is no false conflict and this Court must continue the analysis to determine which state has a greater interest in the application of its laws.

Medical-Dental Specialties, Ltd. v. Tamex Corp., No. 99-3409, No. 99-5265, 2000 U.S. Dist. LEXIS 14536, at \*8 (E.D. Pa. Sept. 28, 2000). When weighing these factors, the court should measure them on a qualitative rather than a quantitative scale. Kilmer v. The Connecticut Indem. Co., 189 F.Supp.2d 237, 243 (M.D. Pa. 2002).

In weighing the factors in the instant matter, both Pennsylvania and Arkansas appear to have significant contacts. Pennsylvania has a significant interest because the policy was delivered here, and therefore was made here. See New York Life Ins. Co. v. Daly, No. 95-6702, 2001 U.S. Dist. LEXIS 16691, at \*6 (E.D. Pa. Oct. 10, 2001). Also, the insured is located in Pennsylvania. Further, although the Policy was negotiated over the phone between several states, there is evidence that all face-to-face negotiations took place in Pennsylvania. In addition, Pennsylvania law generally requires that an insurance policy be governed by the law of the state where the contract was delivered. Id. However, Arkansas also has significant contacts with this matter. The underlying litigation took place in Arkansas, the product in question was sold there and the award of damages is demanded in Arkansas. See Am. Contract, 752 F.2d at 74-75; Western World Ins. Co. v. Reliance Ins. Co., 892 F.Supp. 659, 662 n.6 (M.D. Pa. 1995).

Although this Court would normally have to make a determination based solely on these contacts, the parties have created an additional element to consider. Both Medmarc and Arrow argue that the clause which reads, “except when prohibited by statute, coverage for punitive or exemplary damages is included,” constitutes an enforceable choice-of-law provision. As both parties have provided plausible arguments for why this provision supports the particular state’s law they wish to govern the Policy, there are two possible interpretations for which forum the parties selected as their choice-of-law.

“Contractual language is ambiguous ‘if it is reasonably susceptible of different constructions and capable of being understood in more than one sense.’” TIG Ins. Co., 2002 U.S. Dist. LEXIS 10870, at \*12. Whether a policy provision is ambiguous is a question of law for the court. Butterfield v. Giuntoli, 448 Pa.Super. 1, 14 (1995). “If policy language is ambiguous, the ambiguities are to be resolved in favor of the insured and in a manner consistent with the reasonable expectations that the insured had when he contracted for coverage.” Legion Indem. Co. v. Carestate Ambulance Inc., 152 F.Supp.2d 707, 714 (E.D. Pa. 2001). The court “may use extrinsic evidence to clarify the meaning of an ambiguous contract.” Bethlehem Steel Corp. v. U.S., 270 F.2d 135, 139 (3d Cir. 2001). “Extrinsic evidence may include . . . the conduct of the parties that reflects their understanding of the contract’s meaning.” Teamster’s Indus. Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc., 989 F.2d 132, 135 (3d Cir. 1993).

When considering the parties’ intent as to whether punitive damages would be covered by the Policy, it is clear that the parties intended that such damages would in fact be covered. At the time Arrow originally negotiated the Policy with Medmarc, Arrow informed both Marsh and Medmarc that it wished to purchase coverage for punitive damages awarded in jurisdictions where punitive damages were deemed to be insurable. Def.’s Mot. Summ. J. at 33. Upon this request, Medmarc assured Arrow that it would indemnify Arrow for punitive damages in states where coverage was allowed. In renewing the Policy in 1999, Medmarc never informed Arrow that it would not be covered for punitive damages in those states where punitive damages could be indemnified. “[I]f an insurance policy contains unusual provisions that might defeat the reasonable expectations of the insured, the insurer has a duty at the time of application to volunteer information explaining the insured’s rights. Failure to do so will prevent the insurer

from enforcing those provisions against the insured.” McDonald v. Keystone Ins. Co., 313 Pa.Super. 404, 408-9 (1983). Therefore, at the time Arrow entered into the Policy, Arrow believed it would be covered in states such as Arkansas where punitive damage awards are insurable. Broadbent Aff. at ¶¶ 13, 16, 18; Def.’s Mot. Summ. J. at ¶¶ 11, 12.

Medmarc’s actions also indicate that it believed Arrow was covered for punitive damages in states where such damages could be insured. For instance, Medmarc did not inform Arrow that there was a question regarding punitive damages coverage in the underlying action until fifteen months after that underlying action was filed. Prior to that time, Arrow was completely unaware that Medmarc intended not to indemnify it in the event punitive damages were awarded against it. Kathleen Wetzel Aff. at ¶ 7.

On occasions in the past where Arrow was sued in states precluding coverage for punitive damages, Medmarc quickly issued reservation of rights letters to Arrow indicating that punitive damages were uninsurable in those particular states in which Arrow had been sued. Def.’s Mot. Summ. J. at ¶¶ 35-38; Def.’s Ex. 20, 22. In one instance, where Arrow was sued in a state that did not preclude indemnification for punitive damages, Medmarc, although issuing a reservation of rights letter on other claims, did not reserve rights with respect to the punitive damages claim. Def.’s Mot. Summ. J. at ¶ 39-40; Def.’s Ex. 24. If Medmarc intended for Pennsylvania law to apply to the Policy, and therefore for Medmarc to avoid indemnifying Arrow on the underlying action, it is apparent that Medmarc would have issued a reservation of rights letter to Arrow shortly after the underlying claim was filed. Given the actions of Medmarc and Arrow, it appears that both parties intended for punitive damages to be covered whenever it was



allowed for, and for the law of the state where the damages were claimed to be the law which governs the contract.

Where there is ambiguity in a policy, the law is clear that such ambiguity must be resolved in favor of the insured. Legion Indem., 152 F.Supp.2d at 714. Here, the Policy is ambiguous as to which state's law is to govern, because it only provides that punitive damages will be covered when allowed by statute. As Pennsylvania has no statute regarding punitive damages coverage, it is not clear that the parties intended for Pennsylvania law to govern the Policy. It is clear, however, that Arrow believed it had purchased punitive damages coverage when it was sued in a state where punitive damages were insurable. Since an ambiguous policy provision must be construed in a manner consistent with the insured's reasonable expectations at the time it contracted for coverage, Arkansas law must govern this Policy, and Medmarc must indemnify Arrow for the punitive damages awarded against it in the underlying action. See id.

#### **IV. CONCLUSION**

For the foregoing reasons, Defendant's Motion for Summary Judgment is granted and Plaintiff's Motion for Summary Judgment is denied.

An appropriate Order follows.

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MEDMARC CASUALTY	:	CIVIL ACTION
INSURANCE COMPANY,	:	
Plaintiff,	:	NO. 01-2394
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v.	:	
	:	
ARROW INTERNATIONAL, INC., :	:	
Defendant.	:	

**ORDER**

**AND NOW**, this 4<sup>th</sup> day of February, 2003, upon consideration of Plaintiff Medmarc Casualty Insurance Company's Motion for Summary Judgment (Docket No. 24), Defendant Arrow International, Inc.'s Memorandum in Opposition thereto (Docket No. 29), Defendant Arrow International, Inc.'s Motion for Summary Judgment (Docket No. 25), Plaintiff's Opposition thereto (Docket No. 28) and Defendant's Reply in Support of its Motion for Summary Judgment (Docket No. 31), it is hereby **ORDERED** that Plaintiff's Motion is **DENIED** and Defendant's Motion is **GRANTED**. Judgment is entered in favor of Defendant Arrow International, Inc. and against Plaintiff Medmarc Casualty Insurance Company.

This case is **CLOSED**.

BY THE COURT:

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RONALD L. BUCKWALTER, J.